

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Commission Seeks Comment on Disposition)	
of Down Payments and Pending Applications)	
for Licenses Won During Auction No. 35 for)	
Spectrum Formerly Licensed to NextWave)	WT Docket No. 02-276
Personal Communications Inc., NextWave)	
Power Partners Inc. and Urban Comm - North)	
Carolina, Inc.)	

Comments of Alaska Native Wireless, L.L.C.

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Alaska Native Wireless, L.L.C. (“Alaska Native Wireless”), 1/ by its attorneys, hereby submits its comments in response to the September 12, 2002 *Public Notice* released by the Federal Communications Commission (“Commission”) seeking input on the disposition of down payments and pending applications for certain licenses won in Auction No. 35. 2/ For the reasons set forth below, Alaska Native

1/ Alaska Native Wireless was the second largest bidder in Auction No. 35, with winning net bids totaling \$2.9 billion for 44 licenses. The Commission granted 15 licenses to the company on March 4, 2002. Applications of Alaska Native Wireless, L.L.C., *Order*, 17 FCC Rcd 4231 (2002) (application for review pending); Wireless Telecommunications Bureau Grants Fifteen C and F Block Broadband Personal Communications Services (PCS) Licenses to Alaska Native Wireless, L.L.C., *Public Notice*, 17 FCC Rcd 4563 (2002). Alaska Native Wireless’s applications for the remaining 29 licenses, representing spectrum formerly licensed to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively “NextWave”), or Urban Comm – North Carolina (“Urban Comm”), remain pending. *See* FCC File Nos. 0000363827 and 0000364320. Alaska Native Wireless is owned in part and controlled by three Alaska Native Regional Corporations, constituting the most successful “Designated Entity” in the history of the Commission’s spectrum auction program.

2/ Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 For Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners Inc.

Wireless submits that the current conditions provide a sufficient basis for the Commission to provide relief to the Auction No. 35 winning bidders. ^{3/} We further submit that, to be meaningful, any relief should be implemented in a flexible, commercially reasonable manner and that the Commission should not penalize those winning bidders that elect to avail themselves of relief.

I. INTRODUCTION AND SUMMARY

The unique circumstances associated with licensing delays continuing into the current period of economic decline within the wireless industry present the Commission with a sufficient basis to justify making relief available to affected Auction No. 35 winning bidders. In order to be meaningful, the availability of relief must be flexible. Specifically, any relief program adopted by the Commission must: (1) allow winning bidders at least 180 days to make their elections, and (2) permit winning bidders to make elections on a license-by-license basis. Finally, given the unique circumstances involved, there is no basis for penalizing those winning bidders that elect to avail themselves of any relief made available here. Requiring winning bidders that elect to dismiss all or certain license applications to forfeit all or part of their down payments, or rendering them ineligible to participate in a reauction or aftermarket transaction, would not further the public interest.

and Urban Comm – North Carolina Inc., *Public Notice*, ____ FCC Rcd ____, FCC 02-248 (rel. Sept. 12, 2002) (“*Public Notice*”).

^{3/} The Auction No. 35 winning bidders (“winning bidders”) are those entities listed in Appendix A to the Commission’s February 27, 2001 Public Notice DA 01-520, issued on Feb. 27, 2001.

II. CURRENT CONDITIONS PROVIDE A SUFFICIENT BASIS FOR THE COMMISSION TO PROVIDE RELIEF

The unique circumstances associated with post-Auction No. 35 licensing delays continuing into the current period of significant economic decline within the wireless industry present the Commission with a sufficient factual basis on which to justify making relief available to affected Auction No. 35 winning bidders.

A. The current circumstances are unique

As the Commission noted in the *Partial Refund Order*, bidders participated in Auction No. 35 mindful of ongoing litigation that could delay the grant of certain licenses being offered by the Commission. While the prospect of these litigation-related licensing delays was certainly foreseeable to Auction No. 35 participants, the delays have continued into a period of material economic decline across the nation generally and in the wireless industry specifically. Against this background, the Commission is correct to make clear that the auction-related rights and obligations of the winning bidders remain valid and binding, [4/](#) but the Commission is also correct to consider making relief available to those affected winning bidders that may wish to deploy their resources elsewhere.

[4/](#) The Commission has made clear that the rights and obligations of affected Auction No. 35 winning bidders remain intact and enforceable. *See Public Notice* at 2-3; *Requests for Refunds of Down Payments Made in Auction No. 35, Order*, 17 FCC Rcd 6283, 6290-91, ¶ 12 (2002) (“*Partial Refund Order*”). For example, when it resolved to return a portion of the down payments being held for the subject Auction No. 35 licenses, the Commission indicated that it would “maintain the pending status of the applications for [the subject] licenses” and that its decision did not “relieve[] winning bidders of the obligation to pay their full bid amounts for [those] licenses” *Partial Refund Order*, 17 FCC Rcd at 6283, ¶ 1.

The current circumstances are unique. Auction No. 35 closed almost 21 months ago, yet continuing litigation has prevented the Commission from delivering the licenses to the winning bidders. The factor that distinguishes Auction No. 35 from every other auction held by the Commission is that the Commission has never granted the licenses at issue to the relevant winning bidders and may not be in a position to do so in the near term. ^{5/} At the very same time, the telecommunications industry has been severely affected by the nation's flagging economy. As noted in the *Public Notice*, in the seven months since the Commission issued its *Partial Refund Order*, the state of the capital markets for entities "engaged in the provision of wireless telecommunications services, as well as other telecommunications services, has continued to decline rapidly." ^{6/} This unique combination of circumstances creates a situation in which the Commission could choose to exercise its discretion by making relief available to the Auction No. 35 winning bidders.

B. The wireless industry faces continued economic difficulties since issuance of the *Partial Refund Order*

Observing that the "the telecommunications industry is riding on very stormy seas[.]" ^{7/} Commission Chairman Powell has been actively engaged in efforts to stem the industry's economic decline. Reporting that the industry is "in the midst of

^{5/} *Public Notice* at 5 (even if the Supreme Court resolves the pending litigation in the Commission's favor, "there may nevertheless be unresolved issues over the licenses, that would prolong the litigation[]").

^{6/} *Public Notice* at 3.

^{7/} FCC Chairman Michael Powell Outlines Six Critical Steps for Telecom Industry Recovery; Calls for Legislation in Three Areas, *FCC News Release* (July 30, 2002).

difficult – and for many dire – times[.]” ^{8/} Chairman Powell explained that “there have been nearly 500,000 jobs lost, a reported \$2 trillion of market value extinguished, and by some estimates companies are laboring under nearly \$1 trillion in debt.” ^{9/} In the Chairman’s words, “[t]imes have changed and policies must change.” ^{10/}

Indeed, in the *Public Notice*, the Commission has taken “official notice” of the condition of the capital markets and other economic events. ^{11/} And, earlier this week, the Commission convened an *en banc* hearing ^{12/} in order to gather authoritative information regarding steps toward recovery in the telecommunications industry ^{13/} and to analyze the myriad associated issues.

In this environment, the contingent liability associated with Auction No. 35 only adds to the wireless industry’s present distress. For example, expert scholars have urged the Commission to permit the affected winning bidders to elect to opt out

^{8/} Remarks of Michael K. Powell, Chairman, FCC, at the Goldman Sachs Communicopia XI Conference 1 (Oct. 2, 2002).

^{9/} *Id.*

^{10/} *Id.* at 3.

^{11/} *Public Notice* at 3.

^{12/} FCC To Convene *En Banc* Hearing October 7th on Steps Toward Recovery in the Telecommunications Industry, *Public Notice*, ____ FCC Rcd ____, DA 02-2443 (rel. Sept. 30, 2002).

^{13/} The hearing included a panel discussion entitled *Restoring Financial Health to the Telecommunications Sector*. Panelists were: Robert Konefal of Moody’s Investors Service; Barry Nalebuff of Yale University School of Management; Hal Varian of the University of California, Berkley; Kim Wallace of Lehman Brothers; Lara Warner of Credit Suisse First Boston; and Larry White of the New York University Stern School of Business. FCC Announces Participants for *En Banc* Hearing on Steps Toward Recovery in the Telecommunications Industry, *FCC News Release* (Oct. 4, 2002).

of the contingent liability associated with the auction without penalty. ^{14/} This group of auctions and telecommunications regulation academics have expressly stated that “[t]he FCC’s policy toward Auction 35 exacerbates the financial problems facing the wireless industry ... [and] is a negative stimulus package for a wireless industry desperately in need of a recovery.” ^{15/} The academics also noted that the contingent liabilities associated with the auction “have raised the carriers’ costs of capital, impaired credit ratings, and prompted investment bankers to conclude that Auction 35 has increased uncertainty in the wireless industry.” ^{16/}

In addition, wireless industry leaders recently told President Bush that the fallout from Auction No. 35 is “severely impact[ing] the high-tech wireless sector – forcing bond downgrades, increasing borrowing costs, reducing investments in equipment, software and network improvements, slowing the deployment of new technologies, and cutting high-tech jobs.” ^{17/} Since the conclusion of Auction No. 35,

^{14/} As the Commission has not completed a condition for payment of the balance of a winning bidder’s net bid amount (delivery of the licenses), the winning bidders’ corresponding payment obligations are a contingent liability rather than a debt. The existence of this contingent liability has a negative effect on the ability of the winning bidders to make the decisions and alternative arrangements necessary to meet pressing, near term needs. *See, e.g.*, Letter from Peter C. Cramton, University of Maryland, *et al.*, to Michael K. Powell, Chairman, FCC 2 (Aug. 16, 2002) (“Cramton Letter”) (“The winning bidders from Auction 35 must treat their obligations as contingent liabilities without deriving any benefit from the underlying asset.”).

^{15/} *Id.*

^{16/} *Id.*

^{17/} Letter from Thomas A. Wheeler, President & CEO, Cellular Telecommunications & Internet Ass’n, *et al.*, to The Honorable George W. Bush, President, United States of America (Sept. 16, 2002).

“wireless service providers and equipment manufacturers have lost more than \$850 billion – 65% – in market value; and nearly 250,000 workers have been laid off from wireless industry jobs.” ^{18/} Indeed, American Enterprise Institute economist J. Gregory Sidak has concluded that “the frozen \$16 billion, if released, would increase [the nation’s Gross Domestic Product] between \$19 billion and \$52 billion, between \$12 billion and \$38 billion of which would occur before the end of 2005.” ^{19/}

C. Under the circumstances, making relief available would help to achieve the goals of Section 309(j) of the Act

Under these unique circumstances, a decision to provide relief would help to achieve the goals of Section 309(j) of the Communications Act of 1934, as amended (“the Act”). ^{20/}

First, providing relief would “promot[e] economic opportunity and competition.” ^{21/} For example, a flexible relief mechanism would further the Commission’s more general effort to stem the turmoil in the telecommunications marketplace generally, and in the wireless sector in particular. Making relief available would also foster economic opportunity in other sectors, such as manufacturing. In addition, establishing a relief mechanism will permit winning bidders to elect to free up some or all of their Auction No. 35 capital during a time of

^{18/} *Id.*

^{19/} J. Gregory Sidak, *The Economic Benefits of Permitting Winning Bidders to Opt Out of Auction 35*, Criterion Economics, L.L.C. (Aug. 26, 2002). *See also* Editorial, *Another Telecom Fiasco*, Wall St. J. (Aug. 21, 2002).

^{20/} 47 U.S.C. § 309(j).

^{21/} 47 U.S.C. § 309(j)(3)(B).

economic distress, thus enabling licensees that need immediate spectrum to pursue other spectrum options, and expedite the provision of services. ^{22/} By offering winning bidders extraordinary relief, the Commission will allow them to redirect the capital currently dedicated to Auction No. 35 to more immediate service of the public interest.

Second, making relief available would ensure “efficient and intensive use of the electromagnetic spectrum.” ^{23/} For example, by providing the opportunity to elect relief, the Commission would resolve pending litigation concerning the contingent liability created by Auction No. 35. ^{24/} In addition, an opportunity to elect relief would allow affected winning bidders to refocus their efforts from the expensive and time-consuming need to monitor the multiple litigation fronts to system build-out and the provision of new and innovative services.

For the offer of relief by the Commission to achieve these goals, however, the Commission must make clear the rights and obligations that will be terminated by the relief election. In the *Partial Refund Order*, the Commission indicated that it would “maintain the pending status of the applications for [the subject] licenses” and that its decision did not “relieve[] winning bidders of the obligation to pay their full bid

^{22/} “If the Auction 35 contingent liabilities were removed from their books, the wireless carriers could acquire more wireless licenses, thus increasing the Treasury’s proceeds in future auctions. The carriers would then invest in equipment to deploy the newly acquired licenses.” Cramton Letter at 2.

^{23/} 47 U.S.C. § 309(j)(3)(D).

^{24/} Verizon Wireless has challenged the *Partial Refund Order* in two courts. *Public Notice* at n.7.

amounts for [those] licenses” ^{25/} Against that background, a valid election by an affected winning bidder should constitute the surrender of any and all rights to hold the subject license and to use the associated spectrum derived from the electing party’s status as the winning bidder for the subject license in Auction 35. In exchange, the Commission should dismiss the subject Auction No. 35 license application and return to the electing party the full amount of the post-Auction No. 35 down payment for the subject license held by the Commission under the *Partial Refund Order*. The Commission should also dismiss any pending petition to deny grant of the subject Auction 35 license application as moot. Moreover, the Commission should waive, in whole, application of final payment requirements, default rules and payment requirements that otherwise apply to the electing party in connection with the subject Auction No. 35 winning bid, including those set forth in Sections 1.2104, 1.2107, and 1.2109 of the Commission’s Rules. The Commission should make clear that, as a result of the election, the winning bidder shall have no further obligation to the Commission or the United States, and that the winning bidder shall not be in default under the Commission’s Rules, in connection with the subject Auction No. 35 winning bid.

III. TO BE MEANINGFUL, THE AVAILABILITY OF RELIEF MUST BE FLEXIBLE

Not all Auction No. 35 winning bidders are the same. Accordingly, in order to be meaningful, the availability of relief must be flexible. Specifically, any

^{25/} *Partial Refund Order*, 17 FCC Rcd 6283, ¶ 1.

relief program adopted by the Commission must: (1) allow winning bidders at least 180 days to make their elections, and (2) permit winning bidders to make elections on a license-by-license basis.

A. Providing the winning bidders with a period of at least 180 days in which to elect relief is commercially reasonable and fair

Alaska Native Wireless urges the Commission to provide a commercially reasonable period of at least 180 days during which Auction No. 35 winning bidders may elect to be relieved of their associated rights and obligations. As set forth below, there are a number of public interest factors that support this time frame.

- *Election decisions require material due diligence.* Winning bidders must be afforded adequate time to inventory their licenses and determine how each fits into their business and operating plans.
- *Winning bidders may need to restructure contractual arrangements.* Auction bidders are often governed by complex legal arrangements that have been structured to govern potentially billions of dollars of investments among multiple parties. These complex arrangements include: (1) organic corporate agreements, (2) loan and bank covenants, (3) debt instruments, (4) management and consulting agreements, and (5) operating agreements and trademark relationships. Changing the size and scope of the contemplated wireless system to which these arrangements pertain could affect the nature and economics of the arrangements. A commercially reasonable election period will provide winning bidders with the time necessary to tailor these arrangements, and to obtain any requisite Commission approval.
- *Many more licenses will be “returned” to the Commission if winning bidders do not have the time to restructure contractual arrangements.* Given the enormous dollar values at stake, winning bidders will be forced to relinquish many, if not all, of their Auction No. 35 licenses if they are not allowed adequate time to restructure germane contractual arrangements.
- *Designated entities will often need Commission approval prior to undertaking the necessary restructuring.* The Commission must give

prior approval to any significant contractual or organizational restructuring undertaken by designated entities, including Alaska Native Wireless. Rather than conceptual ideas, the Commission's staff require completed, executed documents on which to pass. From start to end, this coordination and approval process has typically required many months to complete. ^{26/} Non-designated entities need not secure prior Commission approval in these contexts, thus permitting them to act much more quickly. Should the Commission establish a rapid election deadline, it would disadvantage Alaska Native Wireless and those DEs that are under this obligation.

- *No Auction No. 35 winning bidder will be disadvantaged by a 180-day election period.* The Commission should permit Auction No. 35 winning bidders to exercise their election rights at any time after the Commission opens the election period. A winning bidder that wishes to make its elections early in the election period would be free to do so.
- *No future reauction would be affected.* A 180-day election window would not interfere with any future reauction of the subject licenses, which as a practical matter, would not occur for at least six months from the date on which the Supreme Court confirms the Commission's cancellation of the former NextWave licenses, should the Court so rule. Moreover, depending on the need for any further action by the D.C. Circuit following a ruling in favor of the Commission by the Supreme Court, a future reauction of the subject licenses will not occur until even later in time.
- *A 180-day time period in which to make elections is not unprecedented.* In the initial C Block restructuring decision, the Commission initially established a deadline of approximately three months after the release of the initial order by which affected licensees would be required to make any election choice. Due to a series of additional rulings, however, affected licensees were eventually given a period of approximately eight months – almost 240 days – before having to make any election choice. ^{27/} Moreover, with respect to the 218-219

^{26/} In addition to the time dedicated to the task of reviewing germane contractual arrangements, the staff must also spend time coordinating several sets of schedules and addressing timely and meritorious arguments when a third party challenger to an underlying application is permitted to participate in the process.

^{27/} On Sept. 25, 1997, the Commission adopted an order establishing Jan. 15, 1998 as the deadline for broadband PCS C Block licensees to elect to continue under their existing installment payment plan or to elect one of three relief options. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal

MHz Service, the Commission extended an original election deadline for almost one full year. [28/](#)

Simply put, winning bidders must have the time and flexibility to make informed decisions regarding their individual business plans and to take the actions necessary to implement those decisions in advance of making a binding election choice. This is particularly true in the case of affected Auction No. 35 winning bidders that are entrepreneurs or small or very small businesses. For any relief option to be meaningful to these entities, the Commission must ensure that they have sufficient time to undertake any organizational restructuring needed to accommodate a changed

Communications Services (PCS) Licensees, *Second Report & Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 16436 (1997). On Jan. 7, 1998, the Commission postponed the election date to February 26, 1998. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order*, 13 FCC Rcd 686 (1998). On Feb. 24, 1998, the Commission ruled that the election date would be 60 days after *Federal Register* publication of its forthcoming reconsideration order. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order*, 13 FCC Rcd 6956 (1998). The reconsideration order was released on Mar. 24, 1998. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report & Order*, 13 FCC Rcd 8345 (1998). Because the order was published on April 8, 1998, the election date was finally established as June 8, 1998. See Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees, *Public Notice*, 13 FCC Rcd 7413 (WTB, 1998).

[28/](#) On Dec. 28, 1999, the Commission issued a notice that eligible 218-219 MHz Service licensees had to make their restructuring elections by Feb. 29, 2000. In order to allow sufficient time to address the issues raised in various petitions for reconsideration, the Commission later decided to change the election date to the last business day of the first full month after issuance of an order addressing the petitions for reconsideration. The reconsideration order was released on December 13, 2000. Thus, eligible licensees had until Jan. 31, 2001 to exercise their elections. See Wireless Telecommunications Bureau Announces Revised Election Date (Jan. 31, 2001) and Amended Eligibility List for 218-219 MHz Service, *Public Notice*, 16 FCC Rcd 5937 (2001).

business plan and to secure any advance approval required for such restructuring. In the absence of sufficient time, affected designated entities will not be able to participate in any Commission relief program as fully as other affected Auction No. 35 winning bidders. By establishing a commercially reasonable and fair deadline at the outset, the Commission would permit winning bidders to undertake a meaningful review of their options, while saving itself the needless administrative burden of issuing multiple extensions.

B. The Commission should permit Auction No. 35 winners to make elections on a license-by-license basis

The Commission should permit affected Auction No. 35 winning bidders to make relief elections on a license-by-license basis. Implementing a selective opt out proposal, whereby winning bidders could elect to selectively opt out of their obligations on a license-by-license basis, would have significant public interest benefits.

First, this procedure would help to limit the number of Auction No. 35 licenses that must be reauctioned later. A winning bidder of more than one affected Auction No. 35 license might reasonably choose to preserve its applications for many but not all of those licenses. If there was no selective election right, however, that winning bidder – particularly one whose financial resources are restricted in the current economy – might be forced to opt out of all of its pending Auction No. 35 license applications. In that case, the Commission would be forced to reauction all of the subject licenses in the future.

In contrast, permitting that same winning bidder to opt out of its auction-related obligations on a license-by-license basis would enable the bidder to preserve

certain of those Auction No. 35 license applications and to start the provision of service using spectrum authorized thereby upon grant by the Commission. Indeed, the provision of service may well be expedited if the winning bidder can redeploy capital currently held by the Commission – and capital currently dedicated to the contingent liability for the amount of its net winning bids – to system development and construction. The Commission, in turn, will be freed from having to reauct the subject license and to conduct the associated post-reauction licensing proceeding, and the public will enjoy the benefits of service using the underlying spectrum. In short, permitting winning bidders to make relief elections on a license-by-license basis will help to prevent affected winning bidders from opting out of all of their pending license applications where it can be avoided. That is surely in the public interest.

Second, permitting affected winning bidders to make relief elections on a license-by-license basis would help to preserve substantial revenues for the federal government. A reauction of returned licenses might well reap lower winning bids than those pledged in Auction No. 35 and, though the Commission should not make policy judgments based on the revenue to be generated through its competitive bidding program, the Commission should undertake to preserve valid auction bids when possible. Should the Commission determine to make relief available to affected winning bidders, it should do so in a manner designed to preserve the results of Auction No. 35 to the greatest extent possible.

IV. THE COMMISSION SHOULD IN NO WAY PENALIZE THOSE WINNING BIDDERS THAT ELECT TO AVAIL THEMSELVES OF RELIEF

Given the unique circumstances involved, there is no basis for penalizing those winning bidders that elect to avail themselves of any relief made available here. Requiring winning bidders that elect to dismiss all or certain license applications to forfeit all or part of their down payments, or rendering them ineligible to participate in a reauction or aftermarket transaction, would not further the public interest.

When the Commission has made post-auction installment payment relief available to *licensees* in the past, it has conditioned that relief on the forfeiture of all or part of the licensee's associated down payment or the right to reacquire the subject spectrum for a defined period of time. ^{29/} In the case of the prior C Block PCS licensees and the 218-219 MHz Service licensees, the Commission undertook to avoid unjustly enriching those that secured licenses through competitive bidding but later surrendered those licenses without having provided service.

In this case, however, there are no similar circumstances. Here, affected winning bidders have met each of their auction-related obligations to the Commission. Among other things, these winning bidders timely submitted post-auction down payments and license applications, and they stand prepared to remit the balance of their winning bids to the Commission in connection with grant of the subject licenses. This was not the case in the earlier cases of post-auction installment payment relief.

^{29/} Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report & Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 16436 (1997); Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report & Order*, 15 FCC Rcd 1497 (1999).

As the Commission recently observed, “[I]n contrast to the Auction 35 winning bidders, [certain earlier C block licensees] failed to make the payment on which their licenses were conditioned *after* receiving the licenses.” [30/](#) For this reason alone, affected winning bidders should not be penalized for choosing a relief option.

Second, if the Commission determines to make relief available to affected winning bidders, it should be due to the unique combination of post-Auction No. 35 licensing delays and the current period of material economic decline. These litigation-related licensing delays have continued into a period of economic deterioration across the nation and in the wireless industry, a combination of factors that could provide a basis for special Commission action here. If the Commission determines to take this action in part to address the “uncertain and trying economic conditions” to which the Commission referred in the *Public Notice*, it would not serve the public interest to penalize the carriers that stand to redeploy the very capital at issue here.

Third, the winning bidders have already paid a very high – and very real – price for participating in Auction No. 35. In addition to the significant cost of lost interest revenue, there have been sizable economic costs associated with the massive, lengthy, and multi-faceted settlement effort, [31/](#) as well as monitoring

[30/](#) Supplemental Response Brief for the FCC, *FCC v. NextWave Personal Communications Inc., et al.*, Nos. 01-653 and 01-657 4-5 (filed Sept. 30, 2002) (emphasis in original).

[31/](#) “This has been a long and arduous process involving many different parties and divergent interests. It has not been easy reaching a mutually agreeable settlement.” Statement of FCC Chairman Michael Powell on Conclusion of Discussions on NextWave Licenses, *FCC News Release* (Nov. 16, 2001). Moreover, congressional action was required to implement the settlement. *Id.*; *see also*, Statement of Michael K. Powell, Chairman, FCC, Before the Subcommittee on Telecommunications and the

ongoing Supreme Court and other appellate litigation. ^{32/} Indeed, this is not a case in which the parties have abused Commission processes or undertaken to circumvent the public interest. To the contrary, many of the affected Auction No. 35 winning bidders have worked closely with the Commission to resolve competing claims to the subject spectrum and to secure the licenses for which they applied after the auction. Like the Commission, these Auction No. 35 winning bidders have undertaken to preserve the results of the auction and to deploy the spectrum at issue without delay. Against this background, the Commission should not penalize the same group of winning bidders for utilizing relief options provided by the Commission to serve the larger public interest.

Finally, if the Commission were to prohibit the opt out entities from participating in the reauction of or the secondary market for the subject spectrum, the Commission would materially limit the number of entities with resources adequate to acquire the spectrum at issue. We note that all Tier I wireless carriers, with the exception of Nextel, participated in the auction either as a bidder, an investor, or both. Implementing such a prohibition would be likely to stifle future investment opportunities by these companies and others, which will only exacerbate current uncertainties in the capital markets for the wireless industry.

Internet of the House Committee on Energy & Commerce on the NextWave Settlement Legislation (Dec. 11, 2001). Because Congress failed to pass the associated implementing legislation, the settlement agreement failed.

^{32/} See *supra* n.25.

At bottom, the factors that would warrant relief in this context are unique, and the Commission should tailor any relief it provides to the circumstances. In this case, it would be contrary to the nature and purpose of the relief proposed to penalize the very carriers for which it is intended. For these reasons, Alaska Native Wireless urges the Commission to make clear that winning bidders that avail themselves of any relief option offered by the Commission should not be required to pay a monetary forfeiture, nor should they be foreclosed from participating in any reauction of the subject spectrum (or the secondary market for such spectrum) on the same basis as all other interested bidders.

V. CONCLUSION

For the foregoing reasons, should the Commission make relief available to Auction No. 35 winning bidders, Alaska Native Wireless urges the Commission to implement the relief in a flexible, commercially reasonable, and equitable manner.

Respectfully submitted,

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